

NATURAL RESOURCES COMMISSION

July 15, 2014 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Cameron Clark, Secretary
Thomas Easterly
Patrick Early
Alexandra Meyer
Donald Ruch
Doug Grant
R.T. Green
Robert Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandy Jensen
Debra Freije
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

Chris Smith	Executive Office
Mike Smith	Executive Office
Cheryl Hampton	Executive Office
Phil Bloom	Communications
Steve Hunter	Law Enforcement
Danny L. East	Law Enforcement
John Bacone	Nature Preserves
Maggie Byrne	Nature Preserves
Phil Marshall	Entomology
John Seifert	Forestry
Monique Riggs	Division of Water
Linnea Petercheff	Fish and Wildlife
Doug Keller	Fish and Wildlife
Mark Reiter	Fish and Wildlife
Matt Buffington	Fish and Wildlife
Carl Wodrich	Land Acquisition
Dorreen Carey	Nature Preserves (Coastal Program)
Margaret Palicka	Nature Preserves (Coastal Program)
Brian Pavlik	State Parks and Reservoirs

GUESTS PRESENT

Amy Matherly	Dan McInerney	Marc Yancy Lucas	Jeff Durken
Bill Teeguarden	Tim Julien	Nadia Corral Frias	
Erin Huang	<u>Tim</u> Mahony	Christopher Balzer	
Kathleen Lucas	Barb Simpson	Tabitha Lucas Balzer	

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:01 a.m., CDT, on July 15 at The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis. With the presence of ten members, the Chair observed a quorum.

The Chair recognized Alexandra Meyer, as proxy for Mark Newman, Director of the Indiana Office of Tourism Development.

Thomas Easterly moved to approve the minutes for the meeting held on May 13, 2014. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

REPORTS OF THE DIRECTOR, DEPUTIES DIRECTOR, AND ADVISORY COUNCIL

Director Cameron Clark provided his report. He said the lease to rehabilitate the Indiana Dunes State Park Pavilion was finalized. Restoration is scheduled to begin this summer.

Clark reported the May 15th fund raising event for the Natural Resources Foundation held in Fort Wayne was a success and grossed over \$250,000. The first year for the event raised approximately \$150,000 and the second year approximately \$190,000.

Clark commented on a series of unfortunate incidents around the state. “Our Law Enforcement personnel have responded great as always. What is probably not well known is they had a peer support program within Law Enforcement to provide support to those first responders who are on the scene of an incident where someone is either killed or hurt pretty bad. So, we make sure that we give our support to Law Enforcement in times of incidences. The drowning down in Edinburg is a perfect example of our Law Enforcement personnel who are on the scene for days at a time looking for children.” He said the peer support program in place was “about ready to be bolstered” and would involve training with a response victim who is now a trainer at IUPUI.

The Director congratulated the Communications Division on the following awards received at the Association for Conservation Information Conference recently held in Nebraska:

1. **One-time publication brochure:** Water Trails/Tippecanoe River State Park, Rebecca Mauser, 1st Place
2. **Magazine General Interest Article:** The Old Guard/Retired fire towers bring memories of lost tradition (Outdoor Indiana), Nick Werner, 1st Place
3. **Video (Other):** My Hero/Sportsman’s Benevolence Fund, Michael Carney, 2nd Place
4. **Regulations Publication:** Indiana Hunting & Trapping Guide/2013-14, 3rd Place

Chris Smith, Deputy Director for the Bureau of Water Resource and Regulation, provided his report. He said Division of Water staff would hold three public meetings to present the

revisions to the Marion County floodway maps. Approximately 14,000 notices were sent to interested parties. “We expect heavy attendance for those three meetings. We are coming to the completion of the floodway modernization process. Marion County is probably one of the last five that will be completed.”

Smith reported the Division of Entomology and Plant Pathology, in cooperation with U.S. Forest Service, conducted a study at Yellowwood State Forest in Brown County. The walnut tree fungus known to cause Thousand Canker Disease was discovered, but the Walnut Twig Beetle was not. As a result, a ten-acre lot in Yellowwood State Forest was quarantined. The quarantined area does not include any private property.

CHAIR, VICE CHAIR, AND CHAIR OF ADVISORY COUNCIL

Updates on Commission and Committee activities

The Chair introduced proxy Alexandra Meyer with the Department of Tourism.

Jane Ann Stautz, Chair of the Commission’s AOPA Committee, said the Committee is scheduled to meet on August 28.

Patrick Early, Chair of the Advisory Council, reported the Advisory Council met in June. There were no items referred from the Advisory Council to the Commission.

The Chair commented, “This is for those who may not be aware, this will be our Chief Administrative Law Judge’s last public meeting. You know, words really can’t describe to those that don’t work or have not had the opportunity to work with Judge Steve Lucas on a daily basis. The citizens of Indiana certainly have benefited in profound ways from his leadership and stewardship, especially as it pertains to water related issues. He’s a subject-matter expert recognized around the Midwest and the Country. His peers have always given him the highest praise for [his] professionalism, his ethics, his responsiveness, his ability to communicate and adjudicate often times extraordinarily complicated matters. And, it is high praise from your peers that recognize you, really across the board, with that qualification. Many of you have worked with Steve directly, and if you haven’t you’ve been touched by his work as a result of this Commission. And, I don’t know how we can properly thank you, other than publically for all the work that you’ve done.”

Steve Lucas commented, “Thank you, Bryan. Those are wonderful words, and I appreciate what you said. It’s been a great honor to work here. I think that at the Advisory Council meeting, Chris Smith asked me how many years it had been, and I fumbled around and I said long enough that I can’t remember. I think it’s 32 years. It has flown by, working with you here on the Commission and with Sandra, Jennifer and Debbie on our staff, and with the professionals in DNR. Before I came here I was a Deputy Prosecutor, and one of the things that attracted me was that I had worked with Conservation Officers. I worked with a lot of different police officers but I thought the COs were the best. I now know they’re the best. I now know that DNR is the best agency to work with. We sometimes have an odd relationship because our job in the Division of

Hearings is sometimes to say we disagree. But, I've always had the greatest respect and I've always felt that the Department reciprocated. It's been a great gig. Thank you."

The Chair recognized Steve Lucas's wife, Kathleen Lucas.

The Chair added, "For those that care, and there are many in here that probably do, that job is now posted and we will be actively working to realign the administrative law judges and start a new generation after all these years. So again, heart-felt thanks. I've never had an opportunity to work with a more professional individual and makes this civil servant aspect so grateful to be a part of, and I thank you."

DNR, DIVISION OF NATURE PRESERVES

Consideration of the dedication of the Calvert-Porter Addition Nature Preserve in Montgomery County

John Bacone, Director of the Division of Nature Preserves, presented this item. "We're very pleased to acquire this high quality addition." The addition would also provide road frontage and the ability to add a parking lot and a trail in the near future. The land was acquired with assistance from the Indiana Heritage Trust. Bacone recommended dedication of the Calvert-Porter Addition Nature Preserve.

Doug Grant moved to approve the dedication of the Calvert-Porter Addition Nature Preserve in Montgomery County. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of the dedication of the Mosquito Creek Addition Nature Preserve in Harrison County

John Bacone also presented this item. He said the proposed addition would enhance the existing nature preserve that contains limestone glades, canyons, creeks and a number of rare plants and animal species. The added land was acquired with assistance from the Nature Conservancy and the Indiana Heritage Trust. Bacone recommended the dedication of the addition to the Mosquito Creek Addition Nature Preserve.

Donald Rush moved to approve dedication of the addition to the Mosquito Creek Addition Nature Preserve. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

The Chair commented, "Director Clark mentioned the fund raiser up in Fort Wayne and Bourke this is an opportunity to give a one-minute commercial on that, because it's easy to say we raised over \$200,000, but I think the people here need to hear from you just how important that is to the work that you do in light of nature preserves and other things that you support behind the scenes."

Bourke Patton, Executive Director of the Indiana Natural Resources Foundation (INRF), addressed the Commission. Patton explained that the INRF is a not-for-profit organization of the

Department of Natural Resources. “Our goal is to purchase land for recreation and for conservation in northeastern Indiana. We’d like to replicate that program across the State of Indiana, try to have other initiatives that are specific to an area perhaps someplace you care about; something close to your home, so that we can keep nature preserve additions, fish and wildlife areas and state parks—keep that rolling, keep expanding our public land and make Indiana more desirable to tourists and people who are coming to visit our state, looking to relocate their business or live here. So, that’s what we do and what we’re trying to do. Thank you, Mr. Chairman, for letting me share.”

The Chair added, “Many may not realize that a lot of the money that is raised through the Foundation helps to support tremendous outreach that reaches thousands and thousands of people such as the Outdoor Experience, which will be coming up shortly.”

DNR, DIVISION OF FORESTRY

Consideration of request for preliminary adoption of amendments to 312 IAC 15, which provides standards of good forest and resource management, to reflect the merging of the Classified Forest Program and Classified Wildlife Habitat Program; Administrative Cause No. 14-098F

John Seifert, State Forester with the Division of Forestry, presented this item. Seifert said the Classified Forest Program and Classified Wildlife Habitat Program have been in existence since the early 1920s. The programs were established to help landowners with the cost of managing land, particularly regarding forests. In 2006, the General Assembly merged the Classified Forest Program with the Classified Wildlife Habitat Program into what is now entitled the “Classified Forest and Wildlands Program”. Since the merger, there has been a significant increase in the number of acres in the program. The number of landowners has grown significantly. “Of the amount of acres that’s going into the program annually since 1974, we are on track to reach approximately 20,000 acres, which is a significant number of parcels—probably in the range of 300 to 400. The Division of Forestry’s goal is to provide assistance, and promote landowner interest in managing the resource whether it’s wetlands, wildlife or forest.”

Seifert said the Division does a lot of referral work with the private sector. “We’re trying to embrace technology. We actually introduced this idea back when the two programs merged in 2005, 2006 to use GPS and GIS technology to allow these landowners to enroll or re-do their classifications.” Approximately 10% of enrolled parcels are modified on an annual basis. If a landowner wants to add five acres to a 100-acre tract, the landowner would have to resurvey the entire parcel, which may cost approximately \$400.

Seifert explained the proposed amendments would reflect the combined Classified Forest and Classified Wildlife Habitat Program and add an alternative parcel description method for lands being enrolled in the program. “We’ve met with the Surveyor’s Association when this change was going through the Legislature, and they really had no concerns other than they did not want us to be in a position to describe parcels.... All we want is to be able to describe parcels from assessment evaluations.”

The Chair reflected, “It’s a great opportunity for land owners to make some good deposits and have the benefit of good expertise.”

Thomas Easterly moved to approve preliminary adoption of amendments to 312 IAC 15. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF STATE PARKS AND RESERVOIRS

Consideration of recommendations regarding the Patoka Lake Marina Lease

Brian Pavlik with Division of State Parks and Reservoirs presented this item. He said the Patoka Lake Marina is currently on a month to month lease. The DNR mailed four proposal packets to potential future operators. A Statement of Intent was published three times in February and an on-site meeting was held in April 2014. Pavlik stated the Statement of Intent was published in five different states. The current operator, Patoka Lake Marina, Inc., was the only entity to offer a proposal. Pavlik said the Division was satisfied with the proposal and wishes to negotiate the lease.

Bob Wright moved to approve negotiations with the current vendor for the development, operation and maintenance of Patoka Lake Marina. R.T. seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF FISH AND WILDLIFE

Consideration of request for preliminary adoption of amendments to 312 IAC 5-6-11to establish a special boating zone on Simonton Lake located in Elkhart County; Administrative Cause No. 13-201L

Doug Keller, Aquatic Habitat Coordinator with the Division of Fish and Wildlife, presented this item. On October 28, 2013, the Simonton Lake Area Homeowners Association submitted a petition to change a rule requesting the establishment of a special boating zone (commonly referred to as an “ecozone”) on a small area of the east basin of Simonton Lake. Simonton Lake is a 299-acre natural lake located in Elkhart County. A Simonton Lake committee led by Amy Matherly developed the recommendations submitted to DNR, which were based on a 2011 Lake Diagnostic Feasibility Study. The feasibility study found that an ecozone would prove beneficial to the lake in order to maintain aquatic habitat and protect water quality. Keller stated that the Simonton Lake Ecozone Committee “has gone to great lengths to make the residents and interested parties aware of the need to protect one particular area of the lake. It appears there is broad public support for the proposed ecozone.”

Keller said the proposed ecozone is approximately ten acres and is located in the southeast portion of Lake Simonton. Keller visited the site in August of 2012 to observe condition and characteristics. The area is extremely shallow (three feet deep or less) with a fair amount of emergent and submerged vegetation. Despite the shallow and vegetated nature, motorboats and personal watercraft commonly utilize the area, which damages aquatic habitat and suspends nutrients and sediment. The shallow nature of the area also offers a boating hazard. The

shoreline bordering the zone consists of undeveloped shoreline and mostly wetlands. There are no residential areas that would be “boxed-in” as a result of the proposed ecozone.

Keller said that the petition provides the coordinates for the boating zone and requests: (1) gas motors not be permitted in the zone, but electric trolling motors would be allowed; and (2) anchoring boats would be prohibited in the zone since anchors can disturb aquatic vegetation.

Keller added that although there is unanimous support by the Association’s Board of Directors and apparent broad support developed throughout the lake community, the petition includes a sunset clause to “try it to see if they like it”. The Association has accepted responsibility to install and remove buoys in the spring and fall that would mark the restricted boating zone.

Keller informed that Director Clark appointed a review committee composed of himself, representing the Division of Fish and Wildlife, Jim Hebenstreit from the Division of Water, and Kenton Turner representing Division of Law Enforcement to evaluate the merits of the petition and to provide recommendations. The committee agreed that the area represented a boating hazard, and the protection of the shallow area would offer ecological and water quality benefits to the lake. “Restricting high speed boating through the area would address the safety and environmental quality within the zone... and would be easily enforceable”. The proposed rule amendments mirror the Simonton Lake Committee’s request to allow only electric motors and paddling within the zone and prohibiting boats from anchoring. The proposal also includes a sunset clause of January 1, 2021 to provide an opportunity to consider public acceptance, and to decide whether the zone protection should continue after January 1, 2021.

Doug Grant asked if he assumed correctly that Simonton Lake is not a small lake where a ten-mile per hour speed limit applies to boating. Keller answered that Simonton Lake is a high-speed lake.

Grant then asked whether the 299 acres encompass what used to be known as “Big Simonton” and “Little Simonton?”

Keller responded, “It’s the two lakes together that makes the 299, but I’m not sure if the channels that are associated with this lake are part of the 299.”

Amy Matherly, resident of the Simonton Lake, commented, “Actually, we think its 302 acres. We measured everything. The 302 is what we go by.”

Keller added, “I think at least the channels are included to bring that above the 300 to make it a high-speed boating lake.”

Matherly addressed the Commission. She said she was a 30-year resident of Simonton Lake. “My great-grandfather was one of the first people to build a house on Lake Wawasee. I grew up at Lake Wawasee, and he taught us when you live on the lake you’re a guardian of the lake. That’s how we believe, and that’s why I’m involved in my local lake association. About 430 homes are on the Big Simonton and Little Simonton basins. A channel connects the two basins. She noted that some channels at the east end of the small basin were dredged in the 1960s.

Matherly said the Simonton Lake Area Homeowner's Association is very active, and noted that she is a member of the Association's Environmental Committee. The Association publishes a quarterly newsletter and has a Safety Committee that works with the DNR and the county police. Matherly said the Membership Committee has been "successful in making us a neighborhood. ... We're working on a weir to regulate the water that leaves the lake, a dredging project, and the ecozone. We're very excited about the ecozone."

Matherly said the ecozone was in located in the east basin. "If you go back there in a kayak or in a float, you can watch nature. You shouldn't be taking your personal watercraft back in there because it's too shallow.... The guy who services your personal watercraft will tell you that, because you're going to suck up muck inside that motor." An article was published in the *Simonton Lake Newsletter* and the *Elkhart Truth* informing of the August 15, 2012 public meeting on the proposed ecozone. Various meetings were also held throughout 2013, and the ecozone proposal was submitted to the Commission on October 28th. Two hundred fifty people attended Simonton Lake Homeowner's Association General Meeting in August 2012. All comments concerning the proposed ecozone were positive.

The Chair inquired how many residents were summer or full-time residents.

Matherly replied, "We are full-time lake. We're just outside the northern boundary of Elkhart City so we're a residential lake." A recent mass mailing was sent to property owners regarding funding for a dredging project, and only approximately ten letters were returned.

Donald Ruch asked what type of vegetation exists in the shallow area.

Keller responded there is some emergent vegetation. Google Earth images of Simonton Lake show the emergent vegetation beds, but the majority of vegetation is submersed vegetation. "The shoreline area is almost all cattails."

Ruch asked, "What are some of the plants that do occur there?"

Keller noted that mostly spatterdock water lily is the emergent vegetation with common submersed species. Keller stated that data from past surveys would provide a way to evaluate any future changes.

The Chair commented, "Amy, thank you for your stewardship and leadership of the Association and making a nice presentation."

Jane Ann Stautz moved to approve preliminary adoption of amendments to 312 IAC 5-6-11 to establish a special boating zone on Simonton Lake located in Elkhart County. Alexandra Meyer seconded the motion. Upon a voice vote, the motion carried.

Consideration of request for preliminary adoption of amendments to rules (312 IAC 9) governing the possession and sale of river otters and the sale of squirrel hides; Administrative Cause No. 14-054D

Linnea Petercheff presented this item. She said the rule package opens a much-anticipated river otter trapping season in designated Indiana counties starting in November 2015. The amendments in 312 IAC 9-2-3 would allow the sale of river otter hides and parts. She said the allowance of the sale of squirrel hides is proposed as a result of a petition for rule change that was submitted to the Natural Resources Commission in 2013.

Petercheff said that with the river otter season, river otters would need to be removed from the provisions in 312 IAC 9-3-18.2, which would then govern the possession and sale of bobcats and badgers taken outside Indiana. She said the proposed river otter trapping season in 312 IAC 9-3-18.4 would allow an individual to take no more than two river otters from designated counties in Indiana from November 15 through March 15. The counties and the statewide quota would be set by temporary rule each year and would open the season in 64 counties with a first year quota of 600 state-wide. The taking of a river otter would be required to be reported on the department's electronic harvest reporting system within 24 hours. The carcass and hide of a river otter would be delivered to an official river otter checking station within 15 days after the month of harvest to obtain a Convention on International Trade in Endangered Species of Wild Flora and Fauna tag, a federal tag. The federal tag is required when exporting hides out of the country. Most furbearers' hides are sold at the North American Fur Auction in Canada. DNR staff would gather the carcasses in order to determine the statewide quota and to determine the counties that would be open in future years. The DNR plans to eliminate the need for the collection of carcasses after a few years of data collection.

Petercheff stated that amendments to the rule governing the fur buyer's license would include river otters. Also included would be the definition of "furbearing mammal." The amendments would modify the submission date for annual reports, clarifying requirements for documenting the wild animal carcasses that are bought and sold, and require proper disposal of carcasses.

Tim Julian, General Organizer with the Fur Takers of America, addressed the Commission. "I'm here to represent the trappers of the state. We whole-heartedly support the population management of the river otter. Trapping is just a tool and this is a 30-year program. This has to be done; it's really not an option. We need to manage the population."

R. T. Green moved to approve for preliminary adoption amendments to rules in 312 IAC 9 governing the possession and sale of river otters and the sale of squirrel hides. Patrick Early seconded the motion. Upon a voice vote, the motion carried.

Consideration of request for approval of amendments to the nonrule policy document, Floodway Habitat Mitigation, Information Bulletin #17; Administrative Cause No.14-101D

Linnea Petercheff presented this item. She said the Division of Fish and Wildlife requests approval to amend the floodway habitat mitigation nonrule policy document. The document provides guidelines for the DNR and permit applicants for consistency in mitigation

requirements for permits for floodway construction. If a project would result in unreasonable detrimental impacts to fish, wildlife, or botanical resources, mitigation would be required.

Petercheff said over the past two years of implementing the mitigation guidelines, it has become clear that several portions of the guidelines need additional refinement and clarification. Major areas of confusion for permit applicants is the planting rates and spacing of understory and canopy vegetation, as well as determining the success of the plantings. The amendments to the in-stream mitigation requirement would address impacts from 50 feet to 300 feet to be consistent with mitigation requirements of another government agency. Additional technical changes would clarify particular language throughout the policy.

Donald Ruch moved to approve amendments to the nonrule policy document, Floodway habitat Mitigation, Information Bulletin #17. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of Report on Rule Processing, Public Hearing, and Hearing Officer Analysis with Recommendations Regarding Final Adoption of a new rule, 312 IAC 9.5, establishing an option for in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources; LSA Document #13-528(F); Administrative Cause No. 13-088W

Jennifer Kane, Hearing Officer, presented this item. She said for consideration is proposed new rule 312 IAC 9.5 to establish an option for the payment of a fee (known as “in-lieu” fee) to mitigate unreasonable detrimental impacts to fish, wildlife, or botanical resources for activities authorized in permits issued by the DNR under the Lakes Preservation Act (IC 14-26-1), Flood Control Act (IC 14-28-1), and the Navigable Waterways Act (IC 14-29-1). The DNR, Division of Water is the permitting authority.

Kane said mitigation plans are often required and submitted by applicants to restore and establish habitat as a result of a permitted project, and the habitat is usually onsite or near the construction site and within the watershed. A permittee currently has two options regarding mitigation: (1) complete mitigation to establish, restore, or a combination thereof, habitat for fish and wildlife resources; or (2) the use of an approved mitigation bank. “The proposed rule would allow a permit applicant a third option to submit a payment to the Indiana Natural Resources Foundation to serve as the mitigation for these impacts.” The funds would be used to establish or restore, or a combination of the two, habitat for fish and wildlife resources. The Division of Fish and Wildlife indicated that it intends to prepare, and to submit to the Commission for approval, a companion nonrule policy document to support public understanding of the in-lieu fee mitigation program, including a fee schedule, if the rule proposal is given final adoption. She stated 312 IAC 9.5 appears to be appropriate as presented in “Exhibit A” for consideration as to final action.

Bob Wright moved to approve the final adoption of 312 IAC 9.5, establishing an option for in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendation for final action on readoption of 312 IAC 5 governing boating on public waters of Indiana; LSA Document #14-67(F); Administrative Cause No. 14-003L

Jennifer Kane also presented this item and the following two agenda items. Administrative rules adopted under IC 4-22-2 (including Commission rules at 312 Indiana Administrative Code) expire January 1 of the seventh year in which the rule takes effect. Eight Commission rule articles were set to expire January 1, 2015. For consideration are the readoptions of 312 IAC 5 (this agenda item), which governs the use of a boat on public waters of Indiana; 312 IAC 6.3 (Agenda Item #12), which provides standards for the review of contracts for the withdrawal or release of water supply storage from a reservoir; and 312 IAC 18 (Agenda Item #13), which provides standards for the control of pests or pathogens. No public comments were received regarding the proposed readoptions. She recommended that 312 IAC 5, 312 IAC 6.3, and 312 IAC 18 be readopted in their entirety and without amendments.

Robert Wright moved to approve readoption of 312 IAC 5 in its entirety and without amendment. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendation for final action on readoption of 312 IAC 6.3 governing contracts to withdraw water from state reservoirs; LSA Document #14-97(F); Administrative Cause No. 14-004W

[See discussion of previous agenda item.]

Robert Wright moved to approve readoption of 312 IAC 6.3 in its entirety and without amendment. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Consideration of recommendation for final action on readoption of 312 IAC 18, which provides standards for the control of pests or pathogens; LSA Document #14-105(F); Administrative Cause No. 14-007E

[See discussion of previous agenda item.]

Robert Wright moved to approve readoption of 312 IAC 18 in its entirety and without amendment. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

Information Item: Overview of application to the Commission of AOPA and Rule Adoption Amendments in P.L. 72-2014 (HEA 1121)

Sandra Jensen, Assistant Director of the Division of Hearings, presented this item. She said House Enrolled Act 1121 has a variety of impacts to the Commission. SECTIONS 1 and 2, amending IC 4-2-7-3 and IC 4-2-7-9 respectively, require the Inspector General to adopt a rule establishing a code of judicial conduct for all state administrative law judges. The Commission previously adopted a code of judicial conduct for its administrative law judges at 312 IAC 3-1-2.5 that is parallel to a code adopted by the Office of Environmental Adjudication. P.L. 72-2014 requires the Inspector General to consider 312 IAC 3-1-2.5 and the parallel OEA rule in its

preparation of the new statewide code. Upon adoption by the Inspector General of the statewide code, 312 IAC 3-1-2.5 may need to be amended or repealed as obsolete. A recent conversation with the Inspector General revealed the rule adoption process was moving forward but was “going very slowly.” The Inspector General’s office promised meetings with affected State agencies to provide updates.

Jensen noted that SECTION 3 of P.L. 72 expressly authorizes the sharing of administrative law judges with other agencies for reasons such as avoiding conflicts of interest. The Commission recently approved a nonrule policy document authorizing a specified number of hours for ALJ and mediation services to be provided to other agencies. “This statutory provision does not affect the mediation services so we still need that nonrule policy document in place. These two provisions essentially dovetail together and create what we need in order to facilitate through the Shared Neutrals Program.”

Jensen noted that SECTION 4 amendments to IC 4-21.5-3-9 require that anyone hired after January 1, 2014, to act as an administrative law judge under AOPA, must be an attorney licensed to practice in Indiana.

The Chair asked if it is common place for non-attorneys to serve as administrative law judges.

Jensen replied, “In some agencies it is.”

Jensen said of direct application to the Commission is SECTION 4’s prohibition on *ex parte* communications to any individual who makes up the “ultimate authority” of an agency. By statute, the Commission is the ultimate authority for the DNR. The prohibition on *ex parte* communications will “predominantly affect” members of the AOPA Committee. But any member of the Commission may be asked to serve on the AOPA Committee for an individual proceeding so there is a potential to impact every Commission member. The Commission ALJs “have always been in a position where we could not have substantive communications with anyone who might have a direct or indirect interest in the outcome of a proceeding.” The prohibition now also applies to Commission member communications, either direct or indirect, with a party, a person with direct or indirect interest in a proceeding, a person who may have presided over a matter at a previous stage, or any person who served as an investigator, without first providing all parties notice and an opportunity to participate. Jensen offered that what constitutes and *ex parte* communication is defined at I.C. 4-21.5-3-11. A violation of the prohibition on *ex parte* communications can subject a person to prosecution for a Class A misdemeanor.

Jensen explained that a person who has received an unlawful *ex parte* communication either before serving or after being appointed is required to disclose the communication. Disclosure affords the parties an opportunity to object to that member continuing to serve on the AOPA for a proceeding. On the other hand, if the member has had an *ex parte* communication, the member may elect voluntary recusal.

Jensen reported SECTION 5 amended IC 4-21.5-3-24 to authorize the dismissal of an action brought by a person who has not demonstrated the statutory requirements of IC 4-21.5-3-7(a) to qualify for administrative review. Commission administrative law judges have acted upon the

belief this authority was already implicit to AOPA, but questions have arisen in other agencies. SECTION 5 makes explicit what we believed to be implicit.

Jensen reported SECTION 6 resolved an ambiguity in AOPA that had existed since its 1986 enactment. The phrase “agency action” was defined within the context of the initial agency action that framed the proceeding—most commonly by the DNR for our proceedings. Without clarification, the same term was used for the process to initiate judicial review (the judicial stage which can follow a decision by the ultimate authority—the Commission for our proceedings). SECTION 6 distinguishes the original agency action by the agency which precedes a proceeding from the final agency action by the ultimate authority which completes a proceeding. “This amendment makes it very clear that the Department, and other similarly structured agencies, do have the authority to seek judicial review of an unfavorable decision issued by the ultimate authority.”

Jensen reported SECTION 7 makes mostly technical amendments to clarify the required content of the “rulemaking docket” that agencies are required to maintain online.

The Chair commented, “I would ask the Commission to ask questions because this is an important matter for us to understand. He asked Jensen to provide a “real life made-up story” of what the citizen members of the Commission not serving on the AOPA Committee should be aware of concerning *ex parte* communications.

Jensen replied, “If you are not sitting as a member of the AOPA Committee, I don’t know that this is of immediate effect to you in the way you conduct your business.” She provided an example of conversation between a Commission member and Department staff during the Department’s review of an application for a floodway permit that later becomes the subject of an administrative proceeding offering that the conversation would be considered an *ex parte* communication, if the Commission member were to later sit as a member of the AOPA Committee.

Steve Lucas provided an example of discussion with a neighbor, a club member, or church member concerning a riparian rights dispute that would later be brought before the AOPA Committee. “You don’t have to forbear from having the discussion, but if you have that discussion, you probably can’t later serve on the AOPA Committee to consider the pier dispute.” You would need to disclose the discussion before Committee consideration or simply recuse yourself from participation.

Thomas Easterly asked, “And, that’s the only real downside, that you can’t be on the AOPA Committee for having the discussion?”

Lucas replied, “Yes, this has to do with adjudications. The restriction is upon administrative law judges and the AOPA Committee.” The restriction does not apply to other Commission functions, such as rule making. It’s probably important to note that the provisions for unlawful *ex parte* communications also apply to persons making them to an administrative law judge or a board, such as the AOPA Committee.

Jensen concurred with Lucas that the *ex parte* communication was “strictly for adjudications such as ALJ and AOPA Committee functions.”

Information Item: Update on the Natural Resources Commission Records Retention and Disposition Schedule; Administrative Cause No. 12-101A

Jensen noted that in January 2013 the Commission concurred with a proposal to establish a schedule for the retention and disposition of certain types of Commission documents not clearly covered under the established general retention schedules. “We wanted to let you know that we have brought that process to an end” with the adoption of two retention schedules, one for adjudication case files and the second for mediation files. Copies were provided to the members.

Sagamore of the Wabash Award Presentation to Stephen Lucas

The Chair stated, “It is Steve’s last meeting. . . . We have the great honor to recognize Steve officially for his work because words just can’t describe it. We’ve asked a few people to come to this meeting to make a special presentation to Steve on behalf of the Commission. The Chair then recognized Mark Ahearn, General Counsel for the Governor.

Mark Ahearn addressed the Commission. “I’m honored today to be able to make this presentation both from the point of: it’s a wonderful public service to honor, and also [having] personally worked with Steve. . . . We received probably more requests for this presentation [and] there was a full court press saying ‘you really need to honor Steve Lucas’. So, Steve, I’m going to present you the Sagamore of the Wabash from the Governor. And, I would tell you this—and this is my observation and I think it’s consistent with what we’ve heard from many people—the Natural Resource Commission is better for your service. The natural resources of Indiana are better for your service. The State of the Law touching the natural resources of Indiana is better for your service. And, those of us, and more importantly, who worked with you, are better people for your service. So, on behalf of the Governor and the people [the Governor] represents—the Sagamore of the Wabash.”

Steve Lucas stated, “I’m awestruck. Thank you, Mark, and thank you to Governor Pence. I’m without words, but want to express my great appreciation to all of you here today. It’s pretty easy to get to do good stuff when you get to work with good people. Thank you.”

Adjournment

The meeting was adjourned at approximately 11:34 a.m., CDT.